Criminal Law Comment
THE HUSBAND-WIFE EVIDENTIARY PRIVILEGE IN CRIMINAL PROCEEDINGS

The purpose of this comment is to identify and analyze the various problems confronting the courts when applying the husband-wife evidentiary privilege in criminal proceedings. For purposes of simplicity, the areas of conflict will be divided into two general categories: (1) what should the privilege protect, and (2) who should have standing to invoke the privilege.

In relation to admissible testimony in criminal cases, the common law husband-wife privilege operates on two levels. The privilege may first be utilized to render the spouses incompetent to testify for or against each other in a criminal action. Unless otherwise indicated, it will be presumed that the wife is the witness and her husband the one attempting to suppress her testimony.

A problem develops as to the scope of the term...
spouse to testify at all, for or against the other, regardless of the actual testimony, the latter is restricted to a certain class of testimony, namely communications between the spouses or information gained because of the marital relation. Despite this distinction, there appears to be a common thread of justification for both of the rules—the desire of the courts to preserve the marital relationship.

At common law a spouse was disqualified from testifying for the other spouse as to any fact regardless of the source from which it was derived.

With reference to grand jury proceedings, where a spouse is incompetent to testify for or against the other spouse in a criminal prosecution, such incompetency operates to exclude the spouse from testifying before the grand jury. People v. Bladdek, 259 Ill. 69, 102 N.E. 243 (1913). If a spouse is a competent witness at the trial of the other, such spouse may testify before the other before the grand jury. People v. Budzinski, 259 N.Y.S. 656, 102 Misc. 566 (1936). It should be noted that although the rule of People v. Bladdek, supra this note, has not been altered, the Illinois legislature has made either spouse competent to testify in all criminal cases. Ill. Rev. Stat. ch. 38, §734 (1959). It therefore follows that either spouse would be competent to testify for or against the other before a grand jury in Illinois.

A somewhat diverse rule appears to be controlling in post and pretrial hearings. In the case of In re Steve, 73 Cal.App.2d 697, 167 P.2d 243 (1946), a wife was held a compellable witness in a post-conviction hearing to determine the degree of the offense committed by her husband. The court reasoned that such a proceeding is not a trial in the full technical sense, and is therefore governed by the same strict rules of procedure. It is merely a statutory hearing in which the court may consider many matters not admissible on the issue of guilt or innocence. In view of the California statute (supra this note) which makes either spouse incompetent to testify for or against the other without the consent of both, it may be said that the incompetency privilege is unavailable in post trial hearings. And, although direct authority is lacking, by analogy it may be argued that the privilege is also inapplicable to pretrial hearings.

2 In this country, the courts have frequently stated that the statutes protecting marital communications from the demands of the criminal law are limited in effect, even though no common law decision can be uncovered which sanctions the privilege in advance of a statute. Hopkins v. Grimshaw, 165 U.S. 342 (1897); Gjedahl v. Harmon, 175 Minn. 414, 221 N.W. 639 (1928).

The confidential communications privilege is valid for communications of a husband or wife not a party to nor interested in the criminal proceeding. 8 Wigmore, supra note 2, §2334; Bernell v. State, 74 Okla. Cr. 92, 123 P.2d 289 (1942) (Murder prosecution; defendant-husband precluded from testifying as to whether his wife told him of threats of others). Similarly, the privilege may be asserted before a grand jury. Blau v. United States, 340 U.S. 332 (1950).

2 McCormick, op. cit. supra note 2, §82.
Today, the federal courts⁷ and a number of states⁸ authorize a spouse to testify for the other if both the party spouse and witness spouse consent. The question to be resolved is whether the motives behind the contemporary rule, the protection of the party spouse and marital unity, warrant its preservation.

It is conceivable that in the hands of the party spouse the privilege would be rarely used, for its assertion would only deprive the party of favorable testimony. But, testimony, while apparently beneficial, may have an adverse effect if the jury believes that the witness spouse is straining or perverting her testimony with the hope of aiding her counterpart. Similarly, the defendant's attorney must also consider the possibility that testimony "for" his client on direct examination may become adverse on cross examination. Thus, in some instances it may be advantageous for a defendant to preclude his spouse from testifying "for" him.

In the hands of the witness the privilege rendered either spouse incompetent to testify for the other would tend to destroy the marital harmony any time it was claimed. Therefore, domestic tranquility may be shattered by virtue of a rule of law purporting to protect it.

It may be concluded that the motives of protecting the party spouse and the marriage relationship justify entrusting the privilege exclusively to the party spouse, for it should be his prerogative to introduce evidence which he believes will aid his case.

Another phase of the common law rule of incompetency is the defendant's privilege to prohibit his spouse from testifying against him as to any fact, regardless of the source of the witness's knowledge.⁹

Having enunciated this doctrine, the courts were placed in an untenable position, for a spouse could freely commit crimes against the other as long as no other witnesses were present. To avoid such severity, an exception based on the theory of necessity was developed, permitting the wife to testify against her husband when he was accused of perpetrating a crime against her person.¹⁰

The issue which has perplexed the courts is whether to adopt a narrow or liberal construction of this common law exception.

To illustrate, suppose a husband shoots and kills the mother and 13 year old sister of his wife. The majority of jurisdictions holding either spouse incompetent to testify against the other would conclude that the slaying does not constitute a crime against the wife and, therefore, she is barred from testifying against her husband, notwithstanding her desire to do so.¹¹

A general necessity exists where there is no other witness to the facts, whereas a special necessity arises when the spouse would be without a remedy for a personal loss or injury. The court pointed out that the real necessity derives its origin from the fact that without the testimony of the wife, justice may not be done, for the husband should not be permitted, at his option, to exempt himself from punishment by closing the mouth of the only witness against him.

In the past, strict interpretation of the exception as encompassing only personal violence against the witness spouse has resulted in grave injustice. Bassett v. United States, 137 U.S. 496 (1890) (Husband prosecuted for polygamy; wife not permitted to testify against him).

However, a minority of courts have liberalized the exception by widening the scope of the "crimes against the other spouse" provision of the privilege to include polygamy, adultery, bigamy, incest, abandonment, crimes against the children of either or both, and damage to the property of the other spouse. Schell v. People, 65 Colo. 116, 173 Pac. 1141 (1918) (Court held that bigamy is a crime against the wife and, therefore, she is competent to testify against her husband).

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Wilkinson v. People, 86 Colo. 406, 282 Pac. 257 (1929) (Husband raped his stepdaughter; court permitted the wife, the victim's mother to testify against her husband.). O'Laughlin v. People, 90 Colo. 368, 10 P.2d 543 (1932) (Wife killed stepson; husband allowed to testify against the defendant.). State v. Kollenborn, supra this note. (Defendant husband mistreated infant son; wife permitted to voluntarily testify against her husband.). Contra: Compton v. State, 13 Tex. App. 271 (1882); OHIO REV. CODE TIT. 29, §2945.43 (1958); ARIZ. REV. STAT. ANN. §13-1802 (1956); CAL. PENAL CODE §1322 (1956).

A corollary to the doctrine of necessity is the exception which is made in criminal actions or proceedings for a crime committed against another person by a spouse while engaged in perpetrating a crime against the other spouse. People v. Pittullo, 116 Cal.App.2d 373, 253 P.2d 705 (1953) (Prosecution against husband for assault on wife and third person; wife held competent witness as to both assaults.; UNIFORM RULES OF EVIDENCE rule 28 (1953).

¹¹ People v. Horton, 50 Cal. 2d 702, 328 P.2d 777 (1958). It may be argued that the Colorado Supreme Court would rule differently in light of the O'Laughlin case, supra note 10. However, one may distinguish the two decisions on the ground that in the latter the murder was perpetrated upon the child of the witness spouse and consequently was more immediate crime against the spouse. Such a differentiation is a fiction, for in both cases a close personal relationship existed between the witness and the victim was shattered by the violent act of the defendant, thereby inducing the witness to testify.
The only possible result of such a decision is the suppression of relevant evidence, for undoubtedly there remains no marital affection for the court to shelter. Perhaps, a different conclusion would be forthcoming if the wife were the only witness to the murder, for her testimony would then be necessary to obtain a conviction. However, invocation of the doctrine of necessity should not rest on such a contingency, for truth and justice may be subdued where no counter-balancing gain exists.

It would seem that the breach of family harmony justification for the incompetency rule is inappropriate in a case where one spouse's crime and the other's willingness to testify make manifest a permanent rift in the marital relation. Therefore, the exception should be extended beyond crimes against the physical person of the witness spouse where the nature of the offense is the mainspring of the witness's propensity to testify against her husband.

Generally the incompetency privilege is held to exist as long as the marriage relationship is in effect. Divorce or the death of either spouse removes the bar of incompetency. But, where the marriage is entered into only for the purpose of committing fraud or other criminal acts, should such a relationship bar a spouse from testifying against the other?

The Supreme Court has answered in the negative, holding that where the marriage relationship is entered into with no intention of the parties to live together as husband and wife, but merely for the purposes of fraud, the spouses are competent (but not compellable) to testify against each other.

In its interpretation of the common law, the


13. Lutwak v. United States, 344 U.S. 604 (1953). In this case, war veterans went through a marriage ceremony solely for the purpose of gaining entry into the United States for their alien brides. The parties had an understanding that the formal bonds would be severed after the marriage had served its fraudulent purpose. Contra: United States v. Walker, 176 F.2d 562 (2d Cir. 1949). Here, the defendant went through fictitious marriage ceremonies to several women in order to defraud them of funds. One of the marriages became legal and the issue arose as to whether the lawful wife, who had instituted divorce proceedings, could voluntarily testify against her defendant husband. The court determined that the wife was incompetent to testify because she was not a victim of the frauds her husband was on trial for and, therefore, did not fall within the exception for crimes committed against the spouse. This decision is probably invalidated by the Lutwak case.

14. 8 Wigmore, Evidence §2332 (3d ed. 1940). "Four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation: (1) the communications must originate in confidence that they will not be disclosed (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties (3) the relation must be one in which the opinion of the community ought to be fostered and preserved (4) the injury that would inure to the rela-
In order for the communication to be incorporated within the rule, the communicator must intend it to be confidential. Communications between spouses, privately made, are generally assumed to have been intended to be confidential and, therefore, they are privileged. But, whenever a communication, because of its nature or the circumstances under which it is made, is obviously not intended to be confidential it is not privileged. The test of confidentiality used by the courts is whether the communicator relied on the confidence and intimacy of the marital relation in making the disclosure to his spouse. Therefore, it may be said that in order for a communication to be privileged, it must be intended to be both confidential and private.

The problem is to formulate criteria to be used by the courts in ascertaining whether a communication was meant to be confidential. From the divergent results reached in People v. McCormack and Hunter v. Hunter, it is apparent that any test adopted must be flexible. The courts must look to all of the circumstances surrounding the communication before including it within the privilege.

An area of intense controversy relates to the scope of the term "communication." Apart from statutory provisions which have expressly extended the privilege to include acts, facts, transactions, and other matters beyond spoken or written communications, the cases disagree as to whether the statutes which say "communications" should be construed to expand the privilege beyond oral and written utterances.

The liberal view is that in order to effectively protect the marriage relation and encourage confidence between the spouses, the term "communication" must be construed to cover not merely written or spoken words, but also acts performed privately within the presence of the spouse. The general phraseology of the cases so holding is that any act arising out of and performed because of confidence in the marital relation and which would not have been known but for such confidential relation is privileged. Some courts go even further and hold that any information secured by the wife which would not have been known in the absence of such relation is protected.

However, in Hunter v. Hunter, 169 Pa. Super. 498, 83 A.2d 401 (1951), a different decision was reached even though the communicator's voice was audible to third persons. Here, the husband and wife engaged in a violent conversation within the confines of their bedroom. But, unknown to the wife, the husband had stationed their son in an adjoining room for the purpose of recording the verbal exchange. The court asserted that the communications were confidential and refused to admit the recording as evidence.

It may be argued that the Hunter case is based upon the thought that the wife, although shouting, still intended that her remarks be heard only by her husband. A person's emotional condition may induce him to speak lustily even when he wishes his communication to reach only the party to whom he is speaking. An additional fact supporting this rationale is that in McCormack the wife warned her husband that he would be heard by others. Perhaps if such a caution had been advanced in Hunter, the conversation would have been admitted. But, this is unlikely in that the opinion of the court strongly suggests that the basis for the holding is repugnance for the trap set by the husband.
Behind the doctrine is the belief that to limit the privilege to oral or written communications would not conform to the intention of the parties. Of necessity, a spouse must disclose acts and facts as well as oral and written communications in the normal course of living and if the law does not protect the former, it betrays the confidence derived from the marriage.\textsuperscript{25}

A narrower concept has been adopted by Dean Wigmore and a number of courts. They maintain that only utterances and not acts, except in special circumstances, should constitute a privileged communication.\textsuperscript{26} However, if the intention of the communicating spouse was to make this conduct the subject of confidential knowledge, Wigmore would concede the existence of a privileged communication. This intent must be manifested in the form of an invitation of the spouse's presence or attention for the purpose of bringing the act directly to her knowledge.\textsuperscript{27}

The better view is that the confidential communications privilege should not be deemed to protect those acts which are criminal, for otherwise an impenetrable obstacle to the attainment of justice would be created. Whereas the witness spouse would in all such instances be competent to testify against the other spouse, she would be compelled only if the trial judge should find that the admission of evidence outweighs the preservation of marital harmony.\textsuperscript{28}

The privilege is applicable only to communications made during coverture. Therefore, a confidential communication made before the marriage,\textsuperscript{29} or while the husband and wife are living in separation, or while in unlawful cohabitation,\textsuperscript{30} is not privileged. However, a privileged communication made during coverture, is preserved even after the marriage has been terminated by death or divorce.\textsuperscript{31}

Under certain conditions it may be unjust not to recognize an exception where the spouse holding the privilege (communicator) is deceased. Accordingly, the surviving spouse should be allowed to waive the privilege (a) either in the interest of the deceased where he would have waived it (e.g., fraudulent conveyance alleged), or (b) for the exonation of the surviving mate (as where a wife is alleged to have corruptly destroyed her de-
ceased husband’s papers and his consent is sought to be evidenced by her). 29

Generally, a statutory exception is made to the privilege in divorce actions, 30 civil proceedings by one spouse against the other, and criminal wrongs inflicted by one spouse upon the other. In these situations the communicatee is permitted to divulge confidential communications. 31 Absent a statute, a spouse may testify as to confidential communications only where there has been a personal wrong or crime committed against her person. 32 Where there is no existing statutory provision and the crime against the spouse does not involve physical injuries, a few courts have been reluctant to allow the aggrieved spouse (communicatee) to relate confidential communications. 33 In the trial of a controversy between the spouses, such an application of the privilege where the communicatee needs the evidence of communications works an injustice.

One phrase of the rule which has proved troublesome for the courts is whether the privilege should sanction a confidential communication which is made in reference to the planning or commission of a crime or tort. An example of the view adopted by numerous state tribunals is State v. Pizzolotto. 34 Here the defendant-husband, prior to the alleged assault for which he was tried, told his wife that he planned to kill the prosecutrix. The court held the communication privileged and added that the privilege belonged to the defendant (communicator), his wife being unable to waive it for him even though she was hostile and eager to testify.

It would seem the better view that any communication, regardless of the relationship of the parties, made in connection with the planning or commission of a crime should not fall within the purview of any privilege available to the defendant spouse. 35 The witness spouse should be held competent to testify as to the communications (including acts), but should be compellable only when the trial judge discerns that the evidence admitted tips the scales against protecting the marriage. 36

When an otherwise privileged communication is overheard by a third person, either surreptitiously or openly, the cases permit the third person to testify to what he heard, in spite of the fact that the communication remains privileged as between the spouses. 37

There are, however, several exceptions to this general proposition. If the privileged communication is made in the presence of or through a confidential agent of either of the parties, his presence will not revoke the privilege. 38 The Supreme Court in Wolfe v. United States 39 seems to suggest a more comprehensive exception: where the confidential communication must by reasonable necessity be made in the presence of or through a third party, or

8 Wigmore, Evidence §2341.
29 West v. State, 13 Okla. Cr. 312, 164 Pac. 327 (1917).
30 Note, 5 Vand. L. Rev. 590 (1952); Model Code of Evidence rule 216 (1942). "Neither of the spouses has a privilege... in
a. an action by one of them for annulment of marriage or for divorce or separation from the other, or for damages for the alienation of the affections of the other, or for criminal conversation with the other,

34 United States v. Graham, 87 F. Supp. 237 (E.D. Mich. 1949); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943). (Wife may voluntarily testify to communications referring to her transportation in interstate commerce for purposes of prostitution)

35 People v. Ernst, 306 Ill. 452, 138 N.E. 116 (1923) (defendant husband charged with forging wife’s name was not permitted to testify to his wife’s statements authorizing him to sign her name). Contra: Rowley v. Rowley, 144 Okla. 160, 290 Pac. 179 (1930) (Mortgage obtained by dures; wife’s testimony as to her husband’s threats admitted.).
that person is prohibited from repeating the communication in court. In other words, if the confidential communication cannot be conveniently relayed except in the presence of or through a third party, perhaps it will remain privileged as to the third person.43

The majority of jurisdictions recognize still another important qualification to the eavesdropper rule, namely, that the third person may not recite what he overheard when in conspiracy with the communicatee-spouse.44

For documents of communication coming into the possession of a third party the law also makes a distinction. If the third party acquires possession or learns the contents of the written communication from one spouse to the other by interception,45 or through loss or misdelivery by a messenger,46 the privilege will not apply and the third person may testify as to the contents. However, when the delivery or disclosure of the document is due to the voluntary betrayal or connivance of the spouse to whom the message is directed, the privilege is extended to include the interceptor and he is, therefore, not allowed to recite the confidential writing.47

The eavesdropper and interception cases appear to be based upon the thought that since the communicating spouse can usually take effective precautions against disclosure, he should bear the risk of failure to take such measures. Therefore, where the communicator does everything within his power to keep his communication secret, the privilege should be expanded to bar the third party interceptor from relating the message.48

Interwoven with the substantive law of the husband-wife privilege, is the complex procedural question of who has standing to invoke the privilege.

With regard to that privilege which makes the witness spouse incompetent to testify against the party spouse, the states are far from uniform in their views on the standing issue.

In those jurisdictions which make the witness spouse incompetent in most situations to testify against the defendant spouse, the incompetency may not be waived, notwithstanding the consent of both the party spouse and the witness spouse.49 However, where the husband commits a crime against his wife within the common law exception, she may testify over his objection.50 In several of these jurisdictions it has been held that where the witness spouse comes within the exception, she may be compelled to testify as any other witness. The reasoning generally given is that the public policy in having the wife testify to punish a criminal outweighs any desires on her part and also predominates over the public policy of preserving the marriage.51

In the majority of states, either spouse is by statute a competent witness against the other in all criminal cases and may testify as to any occurrences which do not infringe upon the confidential communications privilege.52 However, several of these statutes provide either that the defendant has the privilege of refusing to permit his spouse to testify against him,53 or that the witness spouse

43 Authority seems to deny the privilege in these situations: Comm. v. Wakelin, 230 Mass. 567, 120 N.E. 209 (1918) (dictaphone planted in cell where husband and wife were held); Ward v. State, 70 Ark. 204, 66 S.W. 926 (1902) (Letter to wife given by husband in jail to wife and seized by officers; letter admissible.).

44 N.J. STAT. ANN. §2; 97-4 (1939); OKLA. STAT. tit. 22, §702 (1951). IOWA CODE §622.7 (1950); TEX. CRIM. PROC. ANN. art. 714 (Vernon 1948); OHIO REV. CODE ANN. §2943.42 (Page 1954); GA. CODE §38-1604 (1933); N.C. GEN. STAT. §§8-57 (1953); N.M. STAT. ANN. §41-12-20 (1953).

45 Ibid.

46 Ibid.

47 See e.g., MINN. STAT. ANN. §595.02 (1947).
has a privilege not to testify,\textsuperscript{44} or that both parties must consent before the witness spouse is permitted to take the stand.\textsuperscript{55}

It may be observed that where the privilege accrues to the defendant, the witness spouse would be precluded from testifying against her husband over his objection even where the crime was against her person. To combat this injustice, the legislatures have created exceptions permitting the witness to testify over the defendant’s objection.\textsuperscript{46} In those states where the privilege belongs exclusively to the witness spouse, exceptions are unnecessary, a statement that the spouse is competent in all cases in which she chooses to testify being adequate to protect her rights.

Ten jurisdictions have abolished the common law incompetency privilege in its entirety either by statute or by court interpretation. The witness spouse is deemed competent to testify, and “competent” has generally been interpreted to mean compellable as any other witness. The only restraint on testimony by the spouse in these states is the confidential communications privilege.\textsuperscript{57}

Apart from the general statutes conferring the privilege, a number of jurisdictions have enacted legislation to cover specific situations arising within the framework of the husband-wife privilege.\textsuperscript{48}

\textsuperscript{45} Cal. Penal Code §1322 (1949); People v. Ward, supra note 8.


\textsuperscript{48} Note, 38 Va. L. Rev. 359, 365 (1952). Twenty-six states make the spouse both competent and compellable to testify either for or against the defendant spouse in cases of desertion and non-support, despite statutory provisions concerning confidential communications.

Several jurisdictions have enacted legislation designed to eliminate obstacles to the successful prosecution of a husband who induces his wife into prostitution. The wife has been considered competent to testify against her spouse without his consent. A few states have gone even further by compelling the witness spouse to testify.

A third special situation arises with reference to seduction. Where the defendant avoided prosecution by marrying the accusing female followed by immediate desertion, a few states make the wife competent to testify in such an action if the defendant husband deserts within a specified period after marriage.

In contrast to the states, standing to invoke the privilege in the federal courts is not regulated by statute, but has been the product of judicial evolution. When first called upon to decide the issue, the Supreme Court adopted and consistently applied the common law rule of total incompetency of either spouse to testify against the other, unless the case, involved personal injuries to the witness spouse.\textsuperscript{49} However, in Hawkins v. United States\textsuperscript{50} the Court acknowledged that “over the years the rule has evolved from the common law disqualification to a rule which bars the testimony of one spouse against the other unless both consent.”

A majority of courts hold that the marital
privilege based upon the incompetency of the witness spouse cannot be waived by the defendant unless he expressly consents to his spouse testifying.6 A few jurisdictions assert that the party spouse waives the privilege by failing to make a timely and properly stated objection when his spouse is called as a witness against him.62 Likewise, it has been held that the party spouse waives the privilege when he calls his wife to testify for him, thereby making the spouse a compellable witness for the adverse party.63

Contrary to the sharp division of authority as to who possesses the incompetency privilege, the privilege to prevent the disclosure of confidential communications between husband and wife is, by the vast majority of cases, held to belong to the communicating spouse.64

Another dissimilarity between the two privileges is that the spouse possessing the confidential communication privilege may waive it in a variety of ways.65 First, the accused may waive the privilege by failing to raise a timely objection to the testimony of his spouse.66 Second, the privilege may be canceled by out of court conduct.67 Third, if the defendant calls his spouse to testify for him he may relinquish the privilege.68 Fourth, a voluntary disclosure to a third person may eliminate the privilege.69 Fifth, the privilege may be waived by the defendant testifying to conversations with his spouse, in which case the prosecution may interrogate his spouse on rebuttal.70

The basic problem in the area of standing to invoke the privilege is not that of determining what the courts will do in certain cases, but rather whether the application of the common law is justifiable.

Underlying the retention of the common law privilege is the zeal of the legislatures and the judiciary to preserve marital harmony by preventing ill feelings which might result from one spouse testifying against the other. In view of the mounting divorce rate in this country, a sound rule tending to perpetuate marriages is desirable. On the other hand, the rule hampers the administration of justice by excluding valuable evidence, even where the marriage serves no useful social purpose or where the husband and wife, irrespective of the outcome of the case, will never cohabit again. Choosing between the two arguments involves a value judgment which may be guided more by personal philosophy rather than by legal principles.

To develop an intelligent solution one must inquire as to the validity of the presumption that the rule tends to sustain the marital relationship. History points out that while the social and economic forces of society are working to break up the family relationship, the law of evidence is making a rather ineffectual effort to stem the tide by sacrificing justice to a legendary family unity.71 Accordingly, a vitalizing transformation of the privilege would be timely.

One approach would treat a spouse both competent and compellable to testify against the other in criminal proceedings, notwithstanding the disclosure of confidential communications. However, this solution does not protect against the situation where a wife does not wish to testify against her husband, for it presupposes that the admissibility of evidence invariably outweighs the value of marital harmony. But the scales do not always tip in favor of introducing testimony and thus an equitable modification of the proposal is indispensable. Such a limitation would be to vest the trial judge with discretionary power to balance the
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Conceding that it is unlikely that the privilege will soon be totally abolished, perhaps a more immediate solution would be to entrust the privilege to the witness spouse. The witness alone would be the one to ascertain whether the marriage is worth saving, just as it is his or her prerogative to determine the value of the marriage before filing suit for divorce. Surely, if a spouse can end the marital relationship by her own wish, she should also be permitted to commit a lesser act which may only weaken the marriage. Moreover, the courts would then be free of the burden of deciding which marriages are to be preserved and which are, when weighed against the need for relevant evidence, detrimental to society or unworthy of shielding.

The claiming of the privilege by the defendant spouse more likely will be based on self-interest and not on a desire to save the marriage. It follows, then, that such a rule would reduce the number of occasions on which a marriage is employed by the defendant as a decoy to hide deceitful and criminal activities; activities which, though not constituting a personal injury to the spouse, tend to create a feeling of repulsion for the marital partner.

An inconclusive argument raised by the critics of this corrective is that giving the privilege to the witness spouse alone places a weapon of coercion in that spouse's hands. Even if we were to stretch our imagination to believe that a layman considers the legal ramifications before he speaks or acts it is not undesirable to use coercion to prevent criminal conduct.

In retrospect, it may be concluded that the vital issue is not who should hold the privilege, but rather when should the holder of the privilege be allowed to invoke it in a criminal prosecution.

The solution, while not a panacea, is to acknowledge that the privilege is not an absolute but a qualified one, which must relent if the trial judge finds that the evidence is required to effectively fulfill the judicial function. In refusing to allow the privilege to be asserted there are several factors to be weighed by the court against the necessity of bringing in relevant evidence.

First, is the possibility that a rupture of the marital relationship may result if the wife is permitted to incriminate her husband. Where the spouse is willing to testify, the trial judge may conclude that no marital harmony remains to justify excluding relevant evidence. However, should the wife refuse to take the stand against her husband, a presumption of marital fidelity is raised which should be overcome only if her testimony is essential for the state to prove its case. If the prosecution is able to establish the defendant's guilt by other means, the spouse should not be compellable, for justice will be served without shattering the marriage.

A second consideration the court will be required to take note of is the threat of perjured testimony. Where the wife is a voluntary witness against her husband, the accuracy and reliability of her testimony may be questionable if she is prompted by spite or revenge. Similarly, if the witness spouse is compelled to testify she may falsify her remarks in order to protect her husband. Nevertheless, the risk of perjury should not cause undue reluctance to apply the rule, for the safeguards of oath, cross examination, and demeanor are present.

Still another consequence to be weighed is the attitude of society toward a recommendation making either spouse competent and compellable to testify against the other. It is conceivable that a wave of repugnance for such legislation would be the initial reaction, for the thought of a husband being convicted on evidence supplied by his wife does indeed strike a sour note. Thus, the question posed is whether the possibility of public distaste and opposition should influence the operation of the qualified privilege and, if so, to what extent. When one considers that only a small number of persons will ever be affected by the rule and that a substantial benefit will be derived from attaining justice, it seems that public pressure should play no role at all in determining the fate of the evidentiary privilege.

However, although such a position is sound theoretically, when viewed in practical terms it is naive to discount the persuasive force exerted by society upon their representatives in the legislature and judiciary. Therefore, because of the unknown human element one can only assert that the privilege should be independent of any consideration as to what the people think of it; whether this sound approach

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71 The suggestion must be effected by legislative enactment, for all jurisdictions now have a statute referring to the incompetency privilege and or the confidential communications privilege.

72 Williams v. North Carolina, 317 U.S. 287 (1942) (spouse may obtain a binding divorce with or without the consent of the other spouse).